Zeitschrift des Max-Planck-Instituts für europäische Rechtsgeschichte
Journal of the Max Planck Institute for European Legal History

Rechts Rg geschichte

Rechtsgeschichte
Legal History

www.rg.mpg.de

http://www.rg-rechtsgeschichte.de/rg28
Zitiervorschlag: Rechtsgeschichte – Legal History Rg 28 (2020)
http://dx.doi.org/10.12946/rg28/018-030

Rg 28 2020 18 – 30

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Germanic or Roman?
Western European Narratives of Legal Origins

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Abstract

For many centuries, the question whether law was Germanic or Roman in origins preoccupied jurists throughout Western Europe. Rather than assuming convergence, entanglements, and mixing, as would often be the case today, from the 17th and into the 20th century, these jurists set out to prove that their countries (France, England, German territories, and Spain) were of Germanic rather than Romanic legal tradition. Studying these pan-European debates, but centering the attention mainly on Spain, the aim is to answer the question what do narratives of legal origins reveal about the law as well as about identities. Despite their local reiteration, can these pan-European conversations contribute to the elaboration of a European rather than a national legal history?

Keywords: Roman law, Germanic law, Spain, customary law

Tamar Herzog

Germanic or Roman? Western European Narratives of Legal Origins

The question whether law was Germanic or Roman in origins would probably provoke mockery these days. Nonetheless, for many centuries, it preoccupied jurists throughout Western Europe. Rather than assuming convergence, entanglements, and mixing, as would often be the case today, these jurists set out to prove that their countries (France, England, German territories, and Spain) were of Germanic rather than Romanic legal tradition. In what follows, I describe some of their arguments in order to ask what it can tell us about the past as well as the present. Centering my attention most particularly on the Spanish case, I ask, what do narratives of legal origins reveal about the law as well as about identities? And, despite their local reiteration, how can these pan-European conversations contribute to the elaboration of a European rather than a national legal history?

French, English, and German Narratives

In a well-known book titled *Anti-Tribonian* (1567), the French Legal Humanist François Hotman (1524–1590), who was professor of Roman law at the University of Paris, asserted that Roman law was a historical artifact tied to a period (classical period) and a place (Roman empire). It may have been introduced to Gaul following the Roman invasion, but it was wiped out after the Franks, who brought with them their own laws, conquered the territory. This historical narrative led Hotman to conclude that the authentic law of France was of Germanic rather than Roman origin.[1] Based on customary law rather than law books or erudite discussions at universities, Hotman proposed to reconstruct this genuine indigenous French law, purge it from Roman influences, and ensure that jurists would be familiar with its contents.

In a subsequent volume, *Francogallia* (1573), Hotman set out to reconstruct that Germanic autochthonous French law.[2] He explored the conversion of Gaul into a Roman province and its subsequent conquest by the Franks. He then proceeded to examine the political system the Franks instituted and concluded that it pointed to the existence of a political pact. This pact, which delegitimized royal claims to absolutism, guaranteed the continuation of several liberties that Frankish subjects enjoyed before the establishment of the monarchy. Because the pact was anchored in customary law of Germanic origin, monarchs could not violate it by recurring to Roman law, because the only legitimate frame of reference in France was local – as well as Germanic – law.

A few decades later and some three hundred miles away, Edward Coke (1552–1634), solicitor, attorney general, and chief justice of England, as well as a well-known reformer and consolidator of common law, suggested that English law was also based on ancient customs of Germanic origin.[3] Rather than introduced by the Romanized Normans, common law predated their arrival. Authentic and autochthonous, it slowly emerged among the indigenous population of England long before the Norman conquest and/or the revival of Roman law in medieval universities in the 11th and 12th centuries. This law developed without interruptions – the multiple invasions (not conquests, according to Coke) and the constant changes in dynasties never significantly interfering with its progress. Because English kings did not make the law, but rather were made by the law, monarchs who infringed upon this customary law could be considered tyrants and deposed of. In short, Eng-

1 Hotman (1567/1681), most particularly in Chapter XVII. *Anti-Tribodian* is also available in a bilingual French and Spanish edition, Martínez Neira (ed.) (2014), but as far as I can tell, it is still unavailable in English. By stating at the very beginning that Roman law was a historical object, this line of questioning also pointed out its inadequacy for the present time and its non-universal nature. On these questions see, for example Piano Mortari (1962), Birocchi (2006) and Gilli (2009).

2 Hotman (1972). Contrary to Anti-Tibodian, this volume was translated to English as early as 1711. Also see Giesey (1967) and Bouvignies (2006).

3 Pocock (1957), Garnett (2013) and Smith (2014).

land had an ancient and unbroken national law – one that students of law and lawyers had to study and that Coke set out to describe.[4] Guaranteeing the preservation of this law was particularly important because it defended English liberties against their encroachment first by the pope during the Reformation and later by kings and their chanceries.

Although Coke did not proceed as Hotman to purge common law from Roman influences, he did strongly reject suggestions to introduce Roman law in England, suggestions made either by the kings, most particularly by James I upon his ascension to the English crown, or by others who considered Roman law more rational, civilized, and universal than English law.[5] Coke's rejection of all things Roman led him to insist on the great dissimilarity between common and Roman law, and to suggest that Roman law was a foreign system against whose penetration England must fight. Giving birth to (or at least substantially fueling) the myth of English legal exceptionalism, Coke claimed that European countries – other than England – received and practiced Roman law, which implied that they shared a borrowed foreign system. Meanwhile, England had an autochthonous, continuous, insular, and unique law, which was immemorial. Rather than barbaric or illogical, as some argued, this law was reasonable and superior.

Coke's aim in authoring a series of books – which were organized as Roman compilations of law (the *Corpus Iuris Civilis*) because they contained a student manual (which he identified as the *Institutes*) and a series of Law Reports (which, like the Digest, represented juridical thinking) – was to distance English from Roman law. However, these works paradoxically brought them closer together, or at least uncovered the degree to which Coke was influenced by Roman law and Roman jurisprudence.[6]

While Coke rejected Roman law, John Hare was concerned with eliminating all remnants of French influence from English law. Building on the former's observation, Hare said in 1642 that it was time to end the dishonor of the English, who continued being a conquered and captive nation if one observed the ongoing presence of »foreign laws, language, names, titles and customs then introduced and to this day domineering over ours.«[7] Rather than originating from the Romanized Normans, the English were »members of the Teutonic Nation, and descended out of Germany … our mother nation.« As Saxons, they were »true inheritors and partakers« of a Germanic heritage, which included »happy laws, laws envied but not equaled in Christendom.« He thus proposed »that all laws and usages introduced from Normandy be abolished.«

Coke was not the only scholar to associate Germanic (Anglo-Saxon) customs with English liberties. Regardless of the question whether he was inspired by Hotman, we know that Hotman's *Francogalia*, which allegedly reconstructed Franco-Germanic law, captured the attention of other English scholars. Translated, published, and republished, interest in Hotman's work was directly related to political vindications. Linking Hotman to developments in England, in 1711, for example, some suggested that Hotman's ideas set »a true light on just rights and liberties, together with the solid foundations of our constitution; which in truth is not ours only, but that of almost all Europe besides so wisely restored and established (if not introduced) by the Goths and Franks whose descendant we are.« Tying the history of England with that of France as well as parts of Germany, here was an image of a European-wide space of liberty, dependent on Germanic rather than Roman traditions.[8]

In 17th-century Germany, Hermann Conring (1606–1681) also asked about the origins of the laws of his country (*De origine iuris germanici*, 1643).[9] Having studied archival documentation and applying to it a critical method that assessed both authenticity and contents, he concluded that, because the ancient Roman empire and the Holy Roman empire were two distinguishable historical

4 Coke (1628/70), preface.

5 Helgerson (1990) 227. Coke's insistence on distinctions is particularly clear in the second institute 626 and the third institute 208, where he accused Wolsey of attempting to subvert, indeed replace, common law with Roman and canon law. Coke clearly saw Romanists as his adversaries and fought against their influence, which according to him threatened the superior legal system of common law: Smith (2014) 6, 16.

6 Helgerson (1990) 229–233, 240.

7 Hare (1647) 2–3, 10, 12, 19.

8 Hotman (1711/38) i and iii.

9 Conring (1643).

entities, the sources of German law could not be found in Roman law but instead in the history and juridical traditions of Germany itself (parts of Italy included).[10] Reviewing customary, municipal, ecclesiastical, princely statutory law, as well as judicial implementation, Conring recognized the importance of Roman law, but he also argued that it found its way to Germany because of the prominence of university-trained jurists. According to him, rather than having a universal validity – having been adopted by past German kings, most importantly by Emperor Lothar in 1135, or having *de facto* replaced customary law – Roman law was obsolete as a system of law and unfit for present day conditions. Because law emerged historically from the political community and its members, rather than being encapsulated in the *corpus iuris civilis*, German law was mostly a law based on customs, statutes, and judicial decision making. The task at hand, according to Conring, was to collect these different elements and use them to elaborate a new code of German law. While this meant that there was perhaps no need to purge German law of Roman influences, there was certainly a need to discover what this law contained and write it down in the »language of the fathers«.

To disentangle the history of Rome from that of Germany, Conring observed both law and history, especially constitutional history. In his study of German cities (*Exercitatio De Germanici imperii civibus*, 1641) and in »New Discourses on Roman-German emperor« (*Discursus novus de Imperatore Romano-Germanico*, 1642), he set out to describe the historical formation of German polities as well as distinguish the ancient Roman empire from the Holy Roman empire. He reached the conclusion that the German kingdoms were indeed not part of the Roman empire, but instead independent states, with their own traditions dating back to ancient customs and Carolingian law. Not only were the kingdoms of Germany distinct from (rather than a continuation of) the ancient Roman empire, but it was the empire that surrendered to Germany and not the other way around. As a result, Roman emperors wielded no power in Germany and the German kingdoms were not subject to Roman law.[11] Furthermore, Roman law neither possessed universal validity nor was it a reflection of natural law. It was imposed by Rome on conquered territories and peoples. Indeed »even a child can see that the civil law of the city of Rome could not possibly have given the Romans the right to rule the world, for how could the entire world have been founded by a law that was established by a single people in their city?« To think otherwise, Conring stated, was to suffer from »serious delusions«.

The relations between German and Roman law was again debated in 19th-century Germany by the members of the »German Historical School« led by Friedrich Carl von Savigny (1779–1861). Members of this school initially coalesced around the identification of Roman law as a system based on reason and the classification of Germanic law as the product of experience and tradition.[12] According to their view, contrary to Roman law, which no longer had a true *patria*, Germanic laws were customary in orientation and therefore expressed the history, language, culture, and national consciousness (*Volksgeist*) of society. Agreement on these premises, however, did not mask the profound discord regarding the role of Roman law in German legal history. For some, it was an alien system whose bad influence limited the growth of local law and therefore had to be purged for the system to be authentic. For others, it was a superstructure that – lacking a specific nationality – was a common European legacy, which Germans also shared. These contradictory visions led the German Historical School to split into two rival camps. Those adhering to the first interpretation were thereafter identified as »Germanists«; those who supported the second vision were classified as »Romanists«.

Having positioned themselves against Roman law, Germanists proceeded to discover and reconstruct the so-called authentic, medieval, Germanic traditions that predated the arrival of Roman law

10 Stolleis (2008) 283–286, 375, Fasolt (2007) 132 and Rückert (2018) 34–41. On Conring, see also Jori (2006), most particularly, chapter 3.

11 Fasolt (ed. and transl.) (2005), where Conring asks, among other things, what was the de facto and de iure extent of the Roman empire in antiquity, was Germany absorbed into it, and does the empire still exists in the present. On the issue of the extension of Roman law to Germany, see B.b on p. 11 and D.c.iii on p. 63. Also see D.b.ii on p. 55–58.

12 von Savigny (1814/1931). Also see John (1989), Whitman (1990) and Dilcher (2016).

and that, according to them, were responsible for the emergence of present-day structures.[13] Many Germanists identified these older traditions with non-erudite, popular, customary law. Among those participating in the quest to recover that law were the Brothers Grimm. Best known as collectors and publishers of folk tales such as *Cinderella*, *Hansel and Gretel*, and *Snow White*, Wilhelm (1786–1859) and Jacob (1785–1863) Grimm were jurists who studied with Savigny. As part of their interest in rescuing a genuinely German past, they set off to the countryside to record popular traditions. Their efforts not only resulted in the famous collection known as the *Tales of the Brothers Grimm*, but also in much lesser known – yet equally important – works on German literature, language, and law. Of particular relevance here is Jacob's compilation of numerous and varied local customs, most of which was carried out in 1813.[14] This compilation, eventually published in two volumes, sought to record legal sources, which allegedly were not contaminated by Roman law, in the various Germanic languages and dialects. Jacob discovered these sources in libraries, but he also paid close attention to legal institutions mentioned in poems, stories, sagas, and spoken language. He aimed to both preserve and study the authentic ancient law, which he considered the true law of the German territories.[15]

While Germanists proceeded to record local traditions, Romanists, von Savigny among them, sought to understand the interaction between German and Roman law. They studied Roman law in order to capture the concepts and principles that helped 15th- and 16th-century German jurists to organize and systematize German local law during a period that many identified as »the reception«. This method led Romanist jurists to imagine that Roman law could (again) do to German law in the 19th century what it had done to it in the 15th century. By using Roman law rather than pure logic, 19th-century jurists could again systematize and organize German law without being unfaithful to its spirit because, according to their vision, by that stage, Roman law had already become a constitutive part of the German being.

Thus, while Germanists viewed Roman law as a foreign legal implant and wished to center their attention on the early Middle Ages, which they assumed was a period that predated Roman influence, Romanists and their followers mainly looked to the late medieval and early modern period. Viewing Roman law as a repository of methods and instruments, they believed that they could use it to describe the existing customary law with precision and consistency. According to them, studying Roman law would be a means for constructing a truly German yet rational, modern, and bureaucratic law that would fit the demands of the 19th century. It was during this period that Goethe remarked that Roman law was like a diving duck. It could be swimming on the surface or diving deep in the water, but whether you saw it or not, it was always there.[16]

Spanish Debates

Until the early 20th century, when the examination of the ancestry of Spanish law became, according to some, one of the most passionate debates among Spanish historians, the question whether Spain was of Germanic or Roman origins did not greatly occupy Spanish jurists.[17] Its prominence during the first half of the 20th century is mostly connected to the growing hegemony of legal historians, who were trained or inspired by German developments, and who set out to demon-

13 Germanists' perception that Roman and German law were opposites rather than complementary was resuscitated in 1920 when the Nazi party called for the replacement of Roman law (identified with a materialistic world order, individualism, and the lack of communal bonds) by a genuine (and good) Germanic law. The Nazi party also referred to the reception of Roman law as a national tragedy and described the return to »the spirit of German law« as a sacred duty. Romanists tried to defend themselves by showing that Roman law shared with Germanic law the most important characteristics, and some even went as far as to describe the Romans as Aryans. On these issues, see Loewenstein (1936) 782–785 and Stolleis (1998) 21, 42–45, 48–63.

14 Grimm (1854/1928).

15 Gibert (1975) 3–4.

16 Goethe was said to have referred to the »enduring life of Roman law, which, like a diving duck, hides itself from time to time, but is never quite lost, always coming up again alive«. Goethe (1875) 389–390, conversation that took place on April 6, 1829.

17 Gonzaga Serra y Clausell (1857) 8, 13, 19–20. Before that date, most Spanish jurists argued that Spanish law was indebted to both the German and Roman traditions: García Barbón de la Flor (1859) 4 and Alvarado Planas (1997a) 11.

strate that the incursion of Germanic tribes to Roman territories guaranteed the introduction of Germanic customary law also in Iberia following its conquest by the Visigoths in the 5th century. These historians agreed that Visigoth elites were fairly Romanized and that they allowed their Hispanic-Romanic subjects to maintain their own customs, which they recompiled in the *Lex Romana Visigothorum* (506 CE). They also consented that, after the Visigoths converted from Arianism to Catholicism (589 CE), Visigoth rulers elaborated new lawbooks that were to apply to both Romans and Goths, such as the *Liber Iudiciorum* (654 CE). Yet, according to these historians, despite all these indications for the importance of Roman law in Visigoth Spain, the majority of Visigoths nonetheless continued to practice their ancient Germanic customs, which were and remained mostly untouched by Roman influence.[18] According to this version, even if the Romanized Visigoth legislation had gained any traction at all (and this was placed in serious doubt), both its validity and influence were certainly lost upon the dismantling of the Visigoth state in the early 8th century. As a result, in the aftermath of the Muslim invasion (starting 711 CE), most Iberians Christians followed Germanic customary (rather than Romanized Visigoth) law. This happened both in territories under Muslim occupation and in the Northern Christian kingdoms that maintained their independence. The conclusion these historians reached was that these Germanic customs would eventually support the extension of Christian rule throughout the Iberian Peninsula in a process traditionally identified as the *Reconquista*.[19]

In the 12th and 13th centuries, the struggle between an original Germanic law and a penetrating new canon and Roman law, propelled by university-trained jurists, ended with the formal reception of Roman law in Iberia. However, according to this portrait, important areas of law remained Germanic. Germanic elements were present in many local *fueros* (collections of customs) and they featured prominently in important fields such as public law (or rather, the relations between monarchs and their vassals), family law, and penal and procedural law.[20] Though acknowledging the presence (even in Spain) of a great variety of Germanic groups, representatives of this current nonetheless affirmed the existence of a single Germanic tradition, at least in Spanish territories. They asserted that »Spanish history, the history of our economic, social, political, and juridical institutions, is heavily shaped from the fifth century onward by a Germanic imprint. From that moment forth, the stamp of Germanification appears as a formative element of the national evolution«.[21]

The proofs supplied by those holding this view mostly consisted in describing similarities between arrangements in Spain and a series of known Germanic institutions, as well as attesting the antiquity of the practices themselves and their distinction from Roman customs or Visigoth law. The omnipresence of Germanic customs, these historians asserted, accounted for why customs across medieval Iberia were homogenous despite sharp political divisions, as well as why they could persist despite constant political changes. Some authors accompanied these conclusions with studies that meant to demonstrate the influence of Germanic law also on canon law, with the aim of questioning the usual narrative that affirmed that the laws of the Church originated in Roman law, and Roman law alone.

These propositions, which tied the history of Spanish law to Germanic traditions, stressed its customary nature, its popular – rather than elite – origins, and its orality. They suggested that the political authorities did not create the law and that their attempts to intervene in the legal order, at least during the high Middle Ages, were mostly futile. These interpretations, involving both a Romantic move and a stand against the monopolization of legal creation by the state, thus portrayed the Middle Ages as a saga of confrontations between legislated law and customs – with customs winning the day. The conclusion was that, during

18 Hinojosa y Naveros (1915/93) 12–13.

19 Menéndez Pidal (1955) and Ficker (1928).

20 Pérez-Prendes Muñoz-Arraco (1999), vol. 1, for example, 369–373. The existence of a unified German law is also evident in Pérez-Prendes Muñoz-Arraco (1993).

21 »La historia española, la historia de nuestras instituciones económicas, sociales, políticas y jurídico-privadas, lleva impresa, a partir del siglo V, fuertemente, la impronta del germanismo. El sello del germanismo aparece desde ese momento integrando la evolución nacional.« Torres López (1926) 322–323.

this period, Spaniards lived in »self-reliant and federal diversity«, with no national law in sight.[22]

Making Spanish law customary also allowed historians to portray law as a legacy particular to that country. Their imagining of pre-*Reconquista* Spain was thus a suitable means of affirming Spanish exceptionality. As had been the case in early-modern France and England and in 19th-century Germany, the aim was to distinguish Spain from other European countries. If a political unity was not yet in existence in that remote past, then at the very least a distinct legal entity did; after all, unlike other countries, even in the Middle Ages, Spain followed a local customary law, not a universal Roman one. Just as important was the quest to establish a firm continuity between the very early and the late Middle Ages, while dismissing as irrelevant the intermediate centuries, which featured an important Muslim and Jewish presence. Describing the persistence of Germanic law from the 5th to the 13th centuries was also a means to sustain the very myth of the *Reconquista*, that is, the story about a people, the Goths, who conserved their »spirit« (their laws) despite constant attempts to dominate them, first by their own Romanized elites and later by the Muslims. Eventually, these strong and resistant peoples, who were now portrayed as autochthonous, would proceed to reconquer »their« land from the Muslims, who were portrayed as invaders.[23] Because these claims were largely in tune with the dominant discourse of the Franco regime, by the 1950s they carried the day. They became an axiom, as Alfonso García Gallo suggested, that no one dared to discuss, much less attempted to prove. By that time, he argued, most historians had internalized this axiom to such an extent that it was more or less a foregone conclusion. They concentrated instead only on attempting to understand Spanish medieval law by uncritically employing this Germanic perspective.[24]

Resistance to these views was initially quite timid and originated with legal historians who either stressed the importance of Roman legacy or who dismissed the Germanic contribution as both short lived and insignificant because it mediated between one period of Roman domination (during the empire and immediately thereafter) and another (the expansion of canon law and the medieval revival of Roman law).[25] These intellectuals insisted that Roman law was continuously present throughout the entire Middle Ages, during which customary law was Romanic rather than Germanic in orientation. The conclusion they reached was that the true Spain was Romanic and that the Germanic traditions were foreign. The Visigoths, they argued, imposed Romanized legal compilations throughout most of the Iberian Peninsula, and these compilations maintained their supremacy among Christians under Muslim domination. It was this Romanized Visigoth law, not Germanic law, which guided the *Reconquista*.[26]

As happened with the members of the rival camp, evidence for this thesis was mainly based on a mixture of historical facts and common-sense observations. Those holding the Romanist view argued that a small minority of Visigoths could not possibly have influenced the great majority of Romanized Hispanics. Furthermore, the Visigoths themselves were profoundly Romanized.[27] The supposed similarities between Spanish medieval law and Germanic institutions were in reality a mirage. Scholars who identified these similarities in fact registered traits which were common across Europe and were primitive rather than particularly Germanic. As a result, they probably had already existed in pre-Roman Spain rather than were introduced to it by the Visigoths. Contrary to the claims made by those supporting the Germanic thesis, those favoring the Romanist interpretation pointed out that there were no real legal commonalities across Spain and that the Northern peoples who undertook the *Reconquista* were never dominated by the Visigoths and therefore could not have had any Germanic influence.

If those supporting the Germanic thesis wanted to stress the endurance of a Germanic streak that unified Spain legally, if not politically, and was also responsible for the *Reconquista*, and if they wanted to affirm the non-importance of the Muslim period, the aim of Romanists was to connect Spanish law to the prestige of Rome as well as (paradoxically) highlight regional differences inside Spain. While Romanists presented Roman

22 Rückert (2018) 63.
23 Sánchez Domingo (2000/01).
24 García Gallo (1954) 609, 615–616.
25 Minguijón Adrián (1927) 34, 38, 40 and Eyzaguirre (1967/2006) 7, 22–23, 39–49.
26 Clavero (1992) 32–33.
27 García Gallo (1955).

heritage as domestic, they converted all other influences, Visigoths included, into a foreign (and undesired) intrusion. It is also possible that the move to insist on the Romanic tradition involved the wish to reject a Germanic past that these scholars identified with the Habsburg period, which they judged severely as having delayed the progress of Spain.[28] Last but not least, the Romanic interpretation placed not only the Romanized Goths but also Castile at the center stage, Castile being the territory where the Visigoths established their capital Toledo.

Perhaps with the aim of offering a middle ground, in recent decades, scholars belonging to a new generation suggested that Spanish law was indeed Romanic in origin, but they also confessed that, starting in the mid-11th century, it underwent processes of Germanification. According to this vision, the Romanized Visigoth law included in the *Liber Iudiciorum* was applied across most of the Peninsula and, where copies of it were lacking, locals did their best to refer to it, adopt what they knew of it, or copy from it.[29] As a result, until the mid-11th century, references to Germanic law, which were not already included in the *Liber*, were extremely rare. However, they became commonplace thereafter, precisely in a period that other historians identified as involving the reception of the »revived« Roman law.[30] The question they asked is how to explain this growing prominence. The answer they gave was that Germanic references mostly appeared in concessions granted to foreigners of Germanic origins such as the French, the Lombards, the Germans, or the Flemish. Sometimes they were also included in *fueros* – that is, in collections of customs and laws – that these visitors or settlers received. On other occasions, they were introduced to Iberia by pilgrims to Santiago de Compostela, whose presence propelled an important economic and urban development. Thus, although medieval Spanish law was impregnated by Germanic customs, these customs were not brought to the Iberian Peninsula by the Visigoths, but were instead the result of the infiltration of a foreign legal culture in the post-*Reconquista* period. Infiltration could also be explained by the influence of French and papal chancelleries, the practices at the abbey of Cluny, and the interest of Iberian monarchs in introducing Frankish customs, which they found extremely useful. This would explain why, while sources from the 12th and 13th century allow us to envision Iberia as a territory steeped in Germanic customary law, sources from the 8th to the 11th century do not. As a result, if the 13th and 14th centuries can be characterized as a period featuring the reception of Roman law, the preceding two centuries must be imagined as including the »reception of Germanic law«.

The Search for Origins, the Search for Identity

Though in each of these scenarios (France, England, Germany, Spain), the question whether local traditions were Romanic or Germanic played a different role, and if in each of these settings the chronology and actors were distinct, they nonetheless shared a similar perception of what each of these traditions represented. Whether a 16th-century French Humanist such as Hotman, a 17th-century judge such as Coke or an intellectual such as Conring, the members of the German Historical School in the 19th century, and the various participants in the 20th-century Spanish debate, all stereotyped Roman law as a legislated law – one that was highly formal, extremely rational, and had pretensions for universality. On the contrary, they believed Germanic law to be customary, oral, and local. All these interlocutors also assumed that there was such a thing as a »Germanic« or a »Roman« law, that is, that each one of these legal traditions exhibited internal commonalities that were far more important than any divergences and dissimilarities and that each had a clear origin and clear set of characteristics. Scholars also consented in dismissing, to a large degree, the importance of entanglements and convergences between both systems.

Though incredibly powerful and still relevant to the construction of Europe today, it is now gen-

28 Hillgarth (1985) 25.
29 Alvarado Planas (1997b). A longer version of this text is reproduced in Alvarado Planas (1997a) 211–269.
30 Alvarado Planas (1997b) 122, 141–147.

erally agreed that this image of two diametrically opposite legal systems was largely inaccurate and that neither one was what its proponents suggested.[31] Roman law had many customary elements, and these were of central importance to its functioning. Although already important in the Classical period, the role of customary law became particularly pronounced after Roman citizenship was extended throughout the empire (212 CE). During this period, Roman jurists used customary law in order to explain why the local legal systems that pre-dated the extension of citizenship could persist despite the imposition of Roman law. According to their explanation, this was possible because, while Roman law was shared throughout the empire, local law was »customary« and could thus be recognized as valid.[32] In the late medieval period after the revival of Roman law, customary law (which jurists identified as *ius proprium*) continued to play a major role. A great number of *ius commune* jurists were engaged in collecting, registering, as well as changing the pre-existing local legal traditions, which they argued were customary.[33] It was during that period that the concept of »customs« and the idea of »customary law« the way we think about them today took shape. In other words, the customary law both early modern and modern discussants uncritically imagined was the result of the application of Roman law to the pre-existing normative orders, not the remnant of an ancient past, untouched by the passage of time. As far as we can tell, even the perception that Germanic law was »customary« was the direct result of these processes of juridical reformulation.[34] Replacing the older interpretations that assumed that Germanic territories turned to Roman law only in the 15th and 16th centuries, historians now suggest that these territories were deeply influenced by *ius commune* from as early as the 11th and 12th centuries, when many turned to describe and register their so-called customary law.

While some historians questioned whether customs were necessarily Germanic, whether they also existed in Roman law, and if our understanding of how they operated was largely indebted to medieval jurists, other scholars asked whether the many distinct groups that immigrated from northern to central, eastern, and southern Europe, which we habitually identify as »Germanic«, shared a common legal tradition.[35] These scholars pointed out that the movement of these groups was haphazard, carried out in small units, and that it placed their members under such intense contact with other groups and cultures that it is impossible to determine which were their original mores. It is also possible that, because documentation regarding the 7th and 8th centuries is more abundant than records from earlier periods, our vision of these groups and their practices is profoundly anachronistic. Those expressing such views also suggested that if the so-called Germanic groups shared anything at all, it was an Indo-European rather than a specifically Germanic tradition, which was also shared by other primitive Europeans, including the Romans. At any rate, by the time we have sufficient record of these groups, the contact between their members and the Romans had been so intense that it is impossible to ascertain what was Roman and what was Germanic.[36]

If Roman and Germanic law interacted to such a degree, if Roman law was also customary, and Germanic law was influenced by the work of jurists, what were the stakes in presenting them as two antagonistic opposing systems and having to choose affiliation with one or the other? I believe that, despite regional diversities, this paradigm sought to answer two important questions: one regarding the law and the other regarding the nation.

Narratives of Law

The distinction between Roman and Germanic law as presented by those arguing for affiliation with one system or the other seemed to focus on

31 On the relevance of the Romanic versus Germanic in present day Europe, see, for example, Kerneis (2016). Yet, it is clear that the reading suggesting that it was difficult, perhaps impossible, to disentangle Roman from Germanic law, and that both (rather than one or the other) were responsible for the emergence of European national legal systems, was already present in the work of some 17th- and 18th-century jurists: Rückert (2018) 34–60.

32 Ando (2011).

33 Bellomo (1995).

34 Teuscher (2013) and Conte (2016).

35 Lupoi (2000) and Oliver (2011) who engage with some of these questions, though often reaching opposite conclusions.

36 Poly (2016) demonstrates, for example, how difficult it is to disentangle Roman from Germanic while interpreting the 4th-century *Lex Salica*.

the question whether law should be rational and potentially universal, or must it be based on experience and have a local projection.[37] In other words, can law be created by reasonable individuals, or must it slowly evolve in a long historical process that would be particular and distinct to each community? Can the state monopolize legal creation or would doing so be both impossible and unwise? And which of the two systems would better protect what contemporaries wished to achieve?

The continuous reiteration of these debates over several centuries and in distinct conjunctures attests to their difficulty, the plausibility of a plurality of different answers, and the belief that each could carry important political, social, religious, and legal connotations. In the 16th and 17th centuries, choice was often tied to debates regarding the powers of kings or the liberties of communities, but also at stake was the struggle between a papacy, with a Catholic vision of unity supported by Roman traditions, and an expanding Reformed universe that led to fragmentation and often the nationalization of the Church, allegedly supported by local understanding. Eventually, these very same debates came to symbolize a struggle for and against centralization, for and against a growingly interventionist state with a growing hegemony of a new universalist vision focused on a common human reason rather than revelation. The debate could also support a discourse that highlighted the existence of nations and strove to affirm differences rather than commonalities across Europe. By the 20th century in Spain, it would also be tied to debates regarding democracy and regarding the role of religion in the making of nations.

Though the motivations behind these discussions varied, as were the implications across time and geographies, the questions asked were surprisingly persistent. Involving also theories of progress (or criticism thereof), a stress on continuity, or a taste for ruptures, some discussants considered medieval law a prototype for obscurity, chaos, and injustice that were discarded by a heralding modernity. For others, it was a system that had perfected over time, »not so much an impenetrable shadow and a convoluted journey with many wrong turns and dead ends but a slow, ordered progression, in which the long and winding path is a geography of wisdom not folly«.[38]

Prevalent in many European territories, these debates were particularly virulent in Spain where, during the 19th century, constitutional debates often hinged also on disagreement whether the Middle Ages were a period of extensive freedoms and local autonomy, expressed by the coexistence of a multiplicity of local customary laws, or whether the early modern state and monarchical regime introduced an improved defense of individual and collective rights.[39] Were the Middle Ages a period of a legendary democracy, or did they feature oppression? Did the victory of Christian Spain over all non-Christians and the emergence of a stronger centralist monarchy with legislative powers introduce the desired harmony and centralization, or was it responsible for abuse and intolerance?

And, although such questioning was initially also pursued in the English context, whose early authors »celebrated a northern and Gothic law in contrast to Roman, Mediterranean, neo-classical and rationalist juridical tradition«, by the turn of the 18th century, England having adopted so keenly and completely its identity as different, English jurists no longer openly engaged with these queries. Instead, they imagined their country as a space of customary law and allowed their intellectuals to distinguish not between a Roman and a Germanic heritage, but between a continental system (of Roman-Germanic origins) and an English system of common law.

Narratives of the Nation

If the identification of law as Roman or Germanic touched upon important debates taking place regarding law itself, then it also had important repercussions on identity. During much of the early modern period and thereafter, different Europeans asked whether Romans or Germans should be credited for the way their country had developed. Was Rome the main responsible party for the emergence of France, Germany, Britain, and

37 Rojas Donat (2012) 485.
38 Moran (2001) 89–90.
39 Aragoneses (2018) 204, 206–208.

Spain, or were these countries created by the growing hegemony of a Germany largely identified with Charlemagne?[40] Were European countries the result of the extension of Roman civilization, religion, and law, or were they constructed by the violent intrusion of a Germanic militant and colonial frontier? Did the various European countries share a common history and common traditions, or were they different because the nature of their natives was distinct?[41]

Though important across Europe, this debate was particularly virulent in 20th-century Spain, where the question of legal origins almost perfectly coincided with a larger quest to assert (or deny) the exceptionalism of Spain, above all examining the role that conquest, reconquest, Jews, and Muslims might have played in national development.[42] Transforming the medieval period into a battleground for the formation of national identities, Claudio Sánchez Albornoz argued in 1943 that Spain was formed by Christians and Christians alone – the Jewish and Muslim elements having contributed little to its development.[43] Sánchez Albornoz imagined Spain as an eternal, permanent, and uncontaminated unit, which was formed before the Muslim occupation, continued throughout and flourished again during and in the aftermaths of the *Reconquista*. According to him, there was a single tradition across the Iberian Peninsula, one common historical experience, and a single *homo-hispanus* who constantly engaged in a national struggle against all foreign occupiers. Sánchez Albornoz did not hesitate to identify this unique tradition with the legacy of Romanized Goths, whom he presented as a domestic, rather than foreign, power.

Américo Castro was on the opposite side of the spectrum. In 1948 he authored a book in which he sought to demonstrate the hybridity of medieval Spain, which he argued was the result of the mixing between Christians, Jews, and Muslims.[44] Although the term *Convivencia* was not invented by Castro, he is nevertheless credited with popularizing it, as well as with identifying the medieval period as featuring a »living together« of a multicultural, multireligious, and multiracial society – the true Spanish society.[45] In Castro's view, Spanish history was not continuous but rather was made up of a series of important ruptures. Judging these ruptures favorably, Castro argued that they allowed Spain to insert new elements and new traditions, which allowed for continual improvement. Following in his footsteps were other historians who not only insisted on the Muslim and Jewish contributions, but also on their profound Hispanity.[46] These scholars suggested the need to re-insert both Jewish and Muslim history into the *historia patria* and convert the medieval period from a dark to a golden age.

Though diametrically opposed in their views of Spanish history, both Sánchez Albornoz and Castro (and many of those following them) nonetheless agreed that Spain was not the accidental result of recent developments. Instead, it was a historical entity that already came into being in the Middle Ages. As they continued to disagree about the essence of that entity – i. e. was Spain unified or compound? was it autochthonous and pure or mixed and (perhaps even) contaminated? – both scholars stressed the particularity of the Spanish experience.[47]

Within the field of legal history, a somewhat mitigated version of these discussions found resonance in the work of Rafael Gibert.[48] From the late 1960s onward, Gibert insisted that Spanish law was made up of primitive elements as well as Roman, Germanic, Jewish, and Muslim contributions. Gibert envisioned each of these elements separately, yet he also insisted that law was contingent and constantly undergoing change. Because it was tied

40 In its modern reiteration, see Dawson (1932) and Bartlett (1993).
41 Halpérin (2012). Also see p. 6, note 32.
42 Hillgarth (1985) and Green (1998).
43 This analysis was already present in Sánchez Albornoz (1943) and was expressed even more clearly in Sánchez Albornoz (1957/76).
44 Castro (1948).
45 The term *Convivencia* apparently originated in Julián Ribera (1912) and was later taken up by Ramón Menéndez Pidal in 1921: Szpiech (2013) 153, footnote 7. Also see Aragoneses (2018).
46 Glick (1979), Friedman (2011) as well as the many studies affirming the Hispanity of Sephardic Jews. On counter currents, see García-Sanjuán (2018).
47 Ray (2005).
48 For example, Gibert (1975) 8, 11 as well as in Gibert (1968/71).

to the particular history of the territory, Spanish law formed part of a larger European law. But Spain's unique history meant at the same time that it was distinct from the law in other European countries.

In recent decades, a great number of scholars of Spain began interrogating the continuity between past and present, most particularly, the Middle Ages and the early modern period. Others inserted Spanish history and Spanish historical debates into a much broader perspective. Questioning continuity led to the insistence on the importance of change, not to mention the huge variations inside what we now identify as Spain.[49] The broader perspective demonstrated that many Europeans not only went through similar processes of conquest, reconquest, and expansion; Romanization, Germanification, and localism; experienced and managed the co-existence of multiple peoples in their territories (as in the case of Spain), but that they also had similar questions regarding their past.[50] Indeed, as Gibert has argued, if we do not pursue the bigger picture, we stand to misjudge both what is common and what is particular.

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49 Álvarez Junco (2002).

50 Bartlett (1993) and Soifer (2009) 24–30.

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